IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2759 OF 2004

K.Haridas L. Shenoy, a Citizen)
of India, residing at C/o.)
K.G.L. Shenoy, 403, Chandralok)
23-31, Datar Colony, Bhandup)
(East), Mumbai-400 042.)..PETITIONER

Versus

1. M/s.Johnoson & Johnson Ltd.)
a Company incorporated under)
the Companies Act, 1956,)
having its Registered and)
Corporate Office 30, Forjett)
Street, Mumbai-400 036.)
2. V.P. Patil, Presiding Officer)
First Labour Court, having)
his Court at P.W.D.Building)
Bandra (East), Mumbai.)
3. J.P.Limaye, Member,Industrial)
Court, having his Court at)
P.W.D. Building, Bandra (East)
Mumbai.)..RESPONDENTS

Mr.R.S.Pai with Mr. Mahesh Londe i/b.Sanjay Udeshi & Co.,
for the Petitioner.
Mr. M.S. Naik with Mr. S.M. Naik, for Respondent No.1.

CORAM: F.I. REBELLO J.
DATE : 15th October, 2004

ORAL JUDGMENT:

1. Rule. Heard forthwith. The petitioner was in the employment of respondent No.1 for about two decades. By letter dated 5th May, 1994 the petitioner addressed a letter to the Operating Accounting Manager, expressing his desire to resign from the services of the company by giving three months notice. The letter further sets out that the petitioner be relieved immediately. On the very same day the General Manager (Personal) wrote to the petitioner with reference to the letter of resignation, accepting the same and confirmed

having relieved the petitioner from the services of the company with the close of work of May 5, 1994. On that letter the petitioner put in an endorsement setting out that he agreed to and accepted the same. On May 15, 1994 the petitioner addressed a letter to the Vice President of Respondent No.1. In that letter he points out that he had served for over 20 years. It is further set out that Mrs.Sharmila Limaye had assumed that the petitioner on 29th November, 1993 had taken Rs.1,350/- against car hire charges. Then there is explanation for the said amount. The petitioner then set out that there is a plot made by Ms. Sharmila Limaye, K. Ramachandran and Mr. V.B. Bhat to spoil his reputation. He also requested the Vice President of Respondent No.1 to reinstate the petitioner in service. The letter of 15th May, 1994 was addressed to B.S. Billimoria, Vice President. On May 25, 1994 the petitioner addressed another letter to the Senior Vice President (Personnel) in which he set out that he was called to the head office to see Mr. Billimoria but when he arrived instead of Mr. Billimoria he was asked to see Mr. V.Y. Welanker, the Corporate Employee Relations Manager. When he entered the office of Mr. Welanker Mr. S.K. Roy, the Audit Manager was also present in the cabin. He was informed by Mr. Welanker that he had allegedly committed fraud about which allegation he was shocked. He was asked to resign from the services of the company as otherwise his services will be terminated and further investigation and enquiry will be proceeded through Police authority or private agency. It is the case of the

petitioner that he got intimidated with this threatening statement of Mr. Welanker and he was also totally and completely confused. Mr. Welanker further pressurised him to resign from the services of the company though he had sought for one more day for thinking. Mr.Welanker refused to allow him to leave the place unless he resigned. Mr,. Welanker took his resignation under force and pressure. He therefore, requested to allow him to withdraw his resignation and take him back in the service of the company with full back wages with effect from 6th May, 1994. As the petitioner was not reinstated he filed complaint (ULP) No.283 of 1994 before the Labour Court alleging unfair labour practice under Item No.1(a), (b) (d) and (f) of Schedule IV of the I.D. Act. The respondent filed their reply denying the allegations. The petitioner examined himself. On behalf of the company Shri Welanker was examined. By judgment dated 15th December, 1998 the Labour Court was pleased to reject the complaint against which the petitioner preferred Revision Application No.27 of 1999 before the Industrial Court at Mumbai which came to be dismissed by judgment and order dated 24th February, 2004. The petitioner by the present petition challenges the said orders.

2. At the hearing of this petition on behalf of the petitioner their learned Counsel submits as under:-

1. It is submitted that under the Conditions of Service, the termination of service by either side was set out in terms of

the letter of appointment dated January 1, 1994. The clause regarding termination read as under:-

> (a) This engagement may be terminated by either party giving to the other, at any time, notice in writing of three months, or at our option, by paying you remuneration for three months in lieu of notice and expiring at any date.
>
> (b) Notwithstanding anything to the contrary herein contained, misconduct on your part (such misconduct to be determined by this Company) shall entitle us to terminate your services without any notice or payment in lieu of notice."

From this clause, it is submitted that, the resignation could have only be accepted on the expiry of three months from the date of the notice. It was open to the petitioner workmen before the expiry of three months to withdraw the resignation. The workman has so done by his letter dated 25th May, 1994. It was, therefore, not open to the respondent company to have accepted the notice before completion of the period of three months.

(2) It is next submitted that the resignation was not voluntary, but was procured by exerting force and/or coercion on the petitioner. The said letter of resignation was not voluntarily given. The same was withdrawn by letter of May

15, 1994. The act being voidable it was open to the petitioner to withdraw the letter taken under force and/or coercion. It is, therefore, submitted that the action of the respondent No.1 in not reinstating the workman is contrary to law. The Courts below having not considered this aspect the orders suffer from an error apparent and consequently are liable to be set aside.

. On the other hand on behalf of the respondent No.1 their learned Counsel submits that the petitioner has waived his right to withdraw the letter of resignation. It is submitted that the petitioner by his letter of May 5, 1994 had called on the respondent No.1 to accept the resignation immediately. The respondent No.1 acted on the same by accepting the resignation and relieving the petitioner. This was communicated to the petitioner and he accepted the same. It is, therefore, submitted that even if the contract of employment provided for three months notice period by the petitioner calling on the respondent to accept it before the expiry of three months and the respondents having accepted it, it is not now open to the petitioner to contend that he is entitled to withdraw the same. Considering the doctrine of waiver he would not be so entitled. Dealing with the contention of force and coercion, it is submitted that the same is an afterthought. The petitioner by his letter of May 15, 1994 though had made allegations against some employees did not at the first available opportunity when he addressed the first letter did not allege that the resignation was taken

by force and/or coercion. It is only by letter of May 25, 1994 for the first time that the petitioner has alleged that the resignation was taken by force and/or coercion. It is, therefore, submitted that this is purely an after thought. The Courts below had rightly rejected that contention of the petitioner. That is purely a finding of fact and this Court in the exercise of its extra ordinary jurisdiction should not interfere with the orders of the Courts below on that count.

. Both the parties have relied on judgments, which will be adverted to in the course of the judgment.

3. The first question, therefore, that has to be considered is whether considering the clause in the appointment letter, the respondent was bound to wait for the expiry of the period of three months before accepting the letter of resignation. Normally the period of notice has been construed as the period required to be given by the parties so as to enable the parties to manage their affairs. In so far an employer is concerned that can be dispensed with by the employer instead of waiting for a period of three months by paying to the workman/employee wages for the period of three months. In so far as the workman is concerned normally this period is to enable the employer to manage its affairs. This period normally can be waived by the management as it is for their benefit unless there is something to the contrary. The contractual term, therefore, considering the intent and purpose for which such a period is prescribed normally can be

waived by the employer. Such waiver will, however, be excluded in those cases where such a term is statutory in character or having statutory flavour like a provision being provided for in the Standing Orders. In the instant case it is purely a contractual term. In other words in the realm of the law of contract. It is in that context that we must consider this contention.

. Learned Counsel has drawn my attention to the judgment of the Apex Court in the case of Bank of India & Ors. vs. O.P. Sawrnakar & Ors., (2003) 2 SCC 721 to contend that such terms are purely contractual and once that be so it is the Indian Contract Act which will be applicable. Specific attention is invited to paragraphs 48, 50 and 64. It is, therefore, pointed out that the respondent employer having accepted the term of the contract it would be bound by the said term and could not have waived it. It may be pointed out that the judgment was dealing with the issue of a voluntary retirement scheme granted by the Nationalised Banks, when the Apex Court held that it was not part of a statutory regulation but is purely contractual. Reliance is also placed in the judgment of the Apex Court in the case of J.N.Srivastava vs. Union of India and Anr., 1998 SCC (L & S) 1251. In that case the Appellant before the Apex Court was a Government employee. He gave notice of voluntary retirement. The voluntary retirement was to come into effect on 31st March, 1990. The Government accepted the notice on 2nd November, 1989. The appellant withdrew the notice vide letter dated 11th December,

1989. The Apex Court held on the facts of that case that the notice could have been withdrawn before the expiry of three months period. This pertained to statutory conditions of service of Government employee. Once these are statutory conditions of service, unless there is a provision to waive the parties would be bound by the said conditions. It is in that context that the judgment has to be considered. This distinction was noted by the Apex Court in Bank of India & Ors. (supra). Next reliance is placed in the judgment of the Apex Court in the case of Dr. Prabha Atri vs. State of U.P. and Others, (2003) 1 SSC 701. In that case also the Appellant before the Apex Court was a Government employee. A notice was served on her in the matter of dereliction of duties and she was called upon to submit explanation. She gave an explanation calling on the authorities in view of the explanation to withdraw the notice. In the latter part of the letter she set out that if the explanation was not acceptable then she had no option left but to tender her resignation immediately. She was informed that the suspension order could not be withdrawn as the explanation was not found satisfactory. By another order of 9th January, 1999 she was informed that her resignation is accepted with immediate effect. Another order was passed not to proceed with the domestic enquiry. The stand of the Appellant before the Apex Court was that she had never resigned and that she had only expressed an intention to resign. It was this issue which ultimately was considered by the Apex Court. The Apex Court after considering the material and the contention advanced

recorded a finding that the letter could not be construed as to convey any spontaneous intention to give up or relinquish her office accompanied by any act of relinquishment. The Apex Court noted that to constitute a "resignation", it must be unconditional and with an intention to operate as such. The contention advanced by the Appellant before the Apex Court that the letter of 9th January, 1999 should be construed as a letter of registration was rejected. A perusal of the facts and issue which arose therein would show that the ratio of that judgment if construed therein would be merely on the construction of the letter of resignation, considering that the Appellant before the Apex Court in her letter had set out that if her explanation was not accepted then it should be treated as resignation. This judgment would be of no assistance for deciding the controversy which has arisen over here. The employer has placed reliance on the judgment of Krishna Bahadur vs. M/s.Purna Theatre & Ors., (204 (103) FLR 146 The facts involved therein were that the appellant was appointed by the respondent and subsequently confirmed. A disciplinary proceeding was initiated against him wherein he was found guilty. He came to be dismissed from the service which was the subject matter of an Industrial dispute. The Industrial Tribunal set aside the order of dismissal and directed full back wages and compensation. The appellant was permitted to join the duties, but back wages were not paid. Thereafter he was retrenched from service and a sum of Rs.9,030/- was paid as retrenchment compensation. The Union took up the cause of the appellant on various grounds. The

appellant also had initiated proceedings under Section 33-C(2) of the Industrial Disputes Act, 1947 which ended in an amicable settlement whereby the appellant agreed to receive a sum quantified thereof as full and final settlement. He accepted the cheque for Rs.9,020/- as part payment of compensation of Rs.39,000/-. The Tribunal by its award held that the retrenchment was illegal and that the appellant should be deemed to be in continuous service with all benefits. The same was challenged by the respondent employer by filing Writ Petition. An appeal was preferred before the Division Bench. A plea was raised of substantial compliance of requirement of law on the part of the workman for the first time. The said plea found favour with the Appellate Bench, who allowed the Appeal. The respondents were directed to pay the amount as set out therein. It is this order which was the subject matter of the Appeal before the Apex Court. The Apex Court therein noted that the principle of waiver although is akin to the principle of estoppel, the difference between the two,however is that whereas estoppel is not a cause of action, it is a rule of evidence; whereas waiver is contractual and may constitute a cause of action. It is an agreement between the parties and a party fully knowing of its rights has agreed not to assert a right for a consideration. The judgment in O.P. Sawarnakar was also noted. The Appeal in that case by the workman was allowed. However, the reliance placed before the Court was on the aspect of waiver. What is to be noted is to consider a plea of waiver a party must plead waiver and the party pleading waiver must show that the agreement waiving the

right was in consideration of some compromise having come into being. In the instant case no such issue specifically was raised on this count either before the Labour Court or before the Revisional Court.

. It is in that context that we must consider the contentions raised. Once having accepted that the terms of appointment are contractual, it will be open to the parties by a subsequent contract to alter the original contract or the terms of the contract. No doubt in the letter of appointment there was a requirement of three months period before the employee could resign. In so far as the employer is concerned, it was open to the employer not to give notice of three months to the employee but instead to pay him wages for the said three months. Correspondingly there was no such condition on the part of the employee. In so far as the employee is concerned all that was set out was that if the employee decided to terminate his service by resignation he has to give notice of three months. In the letter which was addressed by the petitioner to the respondents such a notice was given. At the same time in the very same letter the petitioner workman requested the management that he may be relieved immediately. This was the nature of offer by the petitioner to the respondent company. This offer was accepted by the company by the letter of 5th May, 1994 whereby the period of three months was dispensed with and the petitioner was relieved from service. The petitioner accepted the same. In other words the original term of contract stood altered by

the mutual agreed terms between the parties whereby the period of three months was given a go-bye. Nothing is pointed out to show that the term in the contract is statutory and/or has statutory flavour. Once that be the case the petitioner workman himself having chosen to give up his right to three months notice and the employer having accepted it, it is not open to the petitioner workman to now contend that the letter of resignation could not have been accepted before the expiry of the period of three months. In law that could have been done. The respondent No.1 accepted it and consequently I do not find any infirmity in the findings of the Courts below on that count.

5. We then come to the next contention as to whether the resignation was obtained by force and/or coercion. There are two concurrent findings of fact by the Courts below. It would, therefore, not be possible for this Court in the exercise of its extra ordinary jurisdiction to interfere with the said findings of fact. No perversity has been pointed out to show that the said findings could not have been so recorded based on material available. Even otherwise to my mind it is impossible to take a view different from the view taken by the Courts below. The letter of resignation is dated 5th May, 1994. The first communication by the petitioner workman was on 15th May, 1994. If it was genuinely the case of the workman that he was coerced or the company forced upon him to submit his resignation then he would have immediately protested that his resignation was taken by force. There was

no such protest immediately. In the letter of 15th May, 1994 once again there were no allegations that the letter of resignation was taken by force or coercion. On the contrary there was explanation in the matter of a voucher in the sum of Rs.1,350/-. There were allegations against Sharmila Limaye, K.Ramachandran and V.B. Bhat. It is only for the first time on 25th May, 1994 that the respondent workman raised the issue of force or coercion. The allegation of force and coercion was not against Sharmila Limaye, K. Ramachandran and V.B. Bhat, but against one Welankar. This after nearly 20 days of the date of resignation. To my mind it is impossible to accept the case as put forward by the petitioner that force or coercion was exercised on him in getting the letter of resignation. There was nothing between 6th May, 1994 and 15th May, 1994 and 24th May, 1994 which prevented the workman from raising a protest. Atleast no explanation has been offered as to why such a long time was allowed to elapse to raise the allegations as contained in the letter of May 25, 1994. To my mind the Courts below have rightly rejected the case as put forward by the petitioner workman. There is, therefore, no case for interference.

6. In the light of that I find no merit in the Petition.

Rule discharged. No order as to costs.

(F.I.REBELLO, J.)